



January 9, 2002

Ms. Ruth H. Soucy  
Deputy General Counsel  
Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711-3528

OR2002-0166

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157109.

The Comptroller of Public Accounts (the "comptroller") received a request for copies of all documents related to a specified audit of a named taxpayer. You state that you have provided the requestor with some responsive information. You claim, however, that portions of the requested information are excepted from disclosure pursuant to sections 552.101, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.<sup>1</sup>

Initially, we note that section 552.022 of the Government Code makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). Another category of public information under section 552.022 is "information in an account, voucher, or contract relating to the

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<sup>1</sup> We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

receipt or expenditure of public or other funds by a governmental body.” Gov’t Code § 552.022(a)(3). One of the submitted documents, which we have marked, is a completed report created by the comptroller. Another document, which we have marked, constitutes information in an account relating to the receipt of public funds by the comptroller.

You claim that the document that is subject to section 552.022(a)(1) is excepted from disclosure pursuant to section 552.111 of the Government Code. You also claim that the document that is subject to section 552.022(a)(3) is excepted from disclosure pursuant to section 552.108 of the Government Code. We note, however, that sections 552.108 and 552.111 are discretionary exceptions under the Act and, as such, do not make information confidential.<sup>2</sup> See Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108), 473 (1987) (governmental body may waive section 552.111). Accordingly, the comptroller may not withhold these two documents from disclosure pursuant to sections 552.108 or 552.111 of the Government Code.

However, you also claim that the two documents that are subject to sections 552.022(a)(1) and 552.022(a)(3) of the Government Code, as well as the remaining submitted information, is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with sections 111.006(a)(2) and 151.027(b) of the Tax Code.<sup>3</sup> Section 111.006(a)(2) provides that information “secured, derived, or obtained by the comptroller or the attorney general during the course of an examination of the taxpayer’s books, records, papers, officers, or employees, including an examination of the business affairs, operations, source of income, profits, losses, or expenditures of the taxpayer” is confidential. See Tax Code § 111.006(a)(2). Chapter 151 of the Tax Code, which pertains to sales, excise, and use tax, also has a similar confidentiality provision. See Tax Code § 151.027(b).

You state that you have identified for our review a sample of the submitted information that was obtained or derived during an examination of the records of the specified taxpayer. Based on our review of your arguments and the documents that are subject to sections 552.022(a)(1) and 552.022(a)(3), we find that you have not demonstrated, nor is it apparent from our review of this information, that the information contained within these two

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<sup>2</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential.

<sup>3</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

documents was secured, derived, or obtained by the comptroller or the attorney general during the course of an examination of the records of the specified taxpayer and is, thus, confidential under sections 111.006(a)(2) and 151.027 of the Tax Code. Accordingly, we conclude that the comptroller may not withhold any portion of these two documents pursuant to section 552.101. However, with respect to the remaining submitted information, we find that you have demonstrated that some of this information, which we have marked, is confidential under sections 111.006(a)(2) and 151.027 of the Tax Code and is, thus, excepted from disclosure pursuant to section 552.101 of the Government Code.

We note that the document that is subject to section 552.022(a)(3) contains account numbers that are subject to section 552.136 of the Government Code. The Seventy-seventh Legislature recently added section 552.136 to the Act which makes certain access device numbers confidential. Senate Bill 694 was passed on May 14, 2001, became effective when it was signed by the Governor on May 26, 2001, and provides, in relevant part, as follows:

**Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.**

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1. Accordingly, the comptroller must withhold from disclosure the account numbers that we have marked pursuant to section 552.136 of the Government Code.

We also note that the document that is subject to section 552.022(a)(1) contains a social security number. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state

pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the comptroller to obtain or maintain this social security number. Therefore, we have no basis for concluding that the social security number is confidential pursuant to section 405(c)(2)(C)(viii)(I) of Title 42 of the United States Code. We caution the comptroller, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security number at issue, the comptroller should ensure that the number was not obtained or is not maintained by the comptroller pursuant to any provision of law enacted on or after October 1, 1990.

You claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d at 160. The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *See* Open Records Decision No. 615 at 5-6 (1993). Finally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *See id.* at 4-5; *see also Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160.

You contend that portions of the remaining submitted information consist of advice, opinion, or recommendations of comptroller attorneys and staff members concerning the application of tax provisions and other material reflecting the deliberative or policymaking processes of the comptroller. Based on our review of your arguments and the applicable remaining submitted information, we do not agree that this information constitutes communications among agency staff consisting of advice, opinions, and recommendations reflecting the policymaking processes of the commission. Rather, we find that these communications concern internal administrative or procedural matters related to the audit of the specified taxpayer. Accordingly, we conclude that the comptroller may not withhold any portion of the remaining submitted information from disclosure pursuant to section 552.111 of the Government Code.

You also claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime" if "release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). The comptroller is a law enforcement agency for purposes of administering the Tax Code. *See A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 678-79 (Tex. 1995). In *A & T Consultants*, the court agreed that the comptroller uses audits to further the comptroller's law enforcement objectives. *See id.* Generally, a governmental body that claims an exception under section 552.108 must reasonably explain, if the information in question does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See Gov't Code §§ 552.108(a), (b), .301(e)(1)(A); see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

Although you state that the documents at issue pertain to a pending re-determination hearing, we conclude that you have failed to explain how the release of the applicable portions of the remaining submitted information would interfere with law enforcement. We also cannot assume that the release of these portions of the remaining submitted information would interfere with law enforcement based on the limited amount of information that you have provided to our office. Accordingly, we conclude that the comptroller may not withhold any portion of the remaining submitted information from disclosure pursuant to section 552.108 of the Government Code.

Finally, you claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) excepts information encompassed by the attorney-client privilege from disclosure. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from disclosure only "privileged information," that is information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions. *See Open Records Decision No. 574 at 5 (1990)*. Section 552.107(1) does not except purely factual information from disclosure, including factual recountings of events, documentation of calls made, meetings attended, or memos sent. *See id.* Based on our review of your arguments and these portions of the remaining submitted information, we find that some of this information constitutes an attorney's legal advice or opinion. Therefore, we conclude that the comptroller may withhold from disclosure the remaining submitted information that we have marked pursuant to section 552.107(1) of the Government Code.<sup>4</sup>

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<sup>4</sup> We note that the document that you submitted to us that you claim to be excepted from disclosure under section 552.107 of the Government Code was actually created subsequent to the comptroller's receipt of the request. In the future, we advise you to submit documents to us for review that were created prior to the comptroller's receipt of a request for information. *See Gov't Code §§ 552.301, .302.*

In summary, the comptroller must withhold from disclosure the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with sections 111.006(a)(2) and 151.027 of the Tax Code. The comptroller must also withhold from disclosure the account numbers which we have marked pursuant to section 552.136 of the Government Code. A social security number contained within the submitted information may be confidential under federal law. The comptroller may withhold from disclosure the remaining submitted information that we have marked pursuant to section 552.107(1) of the Government Code. The comptroller must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 157109

Enc. Marked documents

cc: Mr. Kirk R. Lyda  
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